

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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BRYANT K. CALLOWAY,

Plaintiff,

v.

TORY M. PANKOPF, an individual, TORY
M. PANKOPF, LTD, a Nevada
Corporation,

Defendants.

Case No. 3:12-cv-00441-MMD-WGC

ORDER

(Defs' Request for Reconsideration – dkt.
no. 17; Defs' Motion to Extend Time – dkt.
no. 28)

I. SUMMARY

Before the Court are Defendants Tory M. Pankopf and Tory M. Pankopf, Ltd.'s Request for Reconsideration of District Court's Magistrate Judge's Ruling ("Motion for Reconsideration") (dkt. no. 17) and Third Motion to Extend Time Regarding Dispositive Matter ("Motion to Extend Time") (dkt. no. 28). The Motion to Extend Time and the Motion for Reconsideration are denied.

II. BACKGROUND

The procedural history of this case is detailed thoroughly in Magistrate Judge William G. Cobb's April 11, 2013, order ("Judge Cobb's Order"). (Dkt. no. 15.) A brief recap follows.

Plaintiff Bryant K. Calloway filed the Complaint in California state court on July 9, 2012, and Defendant removed the case to this Court one month later. (Dkt. no. 1.) Defendant filed a statement after removal on September 10, 2012. (Dkt. no. 4.) This case saw no activity from either party until February 25, 2013, when Plaintiff moved for

1 entry of clerk's default. (Dkt. no. 5.) Two days later, Defendant Pankopf filed an Answer
2 on behalf of himself. (Dkt. no. 6.) Judge Cobb entered a minute order directing
3 Defendants to respond to Plaintiff's motion for entry of clerk's default and explain why no
4 answer had been filed on behalf of Defendant Tory M. Pankopf, Ltd. (Dkt. no. 8.) Tory
5 Pankopf, Ltd. then filed an Answer. (Dkt. no. 11) Defendants filed a response to
6 Plaintiff's motion for entry of clerk's default explaining why Tory Pankopf, Ltd.'s Answer
7 was not filed at the same time as Pankopf's Answer (dkt. no. 12), but Defendants did not
8 address the reason for the initial delay in filing responsive pleadings. Judge Cobb's
9 Order directed the Clerk to enter default against Defendants. (Dkt. no. 15.) The Clerk
10 entered default on April 12, 2013. (Dkt. no. 16.)

11 Defendants now move the Court to reconsider Judge Cobb's Order (dkt. no. 17).
12 Plaintiff filed an opposition on May 24, 2013. (Dkt. no. 22.) Defendants' reply was due by
13 June 3, 2013. (*Id.*) On June 3, 2013, Defendants moved to extend the deadline to June
14 7, 2013. (Dkt. no. 24.) The Court granted that motion. (Dkt. no. 25.) On June 7, 2013,
15 Defendants moved to extend the deadline to June 10, 2013. (Dkt. no. 26.) The Court
16 granted that motion. (Dkt. no. 27.) On June 11, 2013, Defendants moved to extend the
17 deadline to June 11, 2013. (Dkt. no. 28.) That motion is now before the Court.
18 Defendants filed their reply in further support of the Motion for Reconsideration on June
19 11, 2013. (Dkt. no. 29.)

20 **III. DISCUSSION**

21 **A. Motion to Extend Time**

22 In the Motion to Extend Time, Defendants request an extension of time in the
23 amount of one (1) day in order to file their reply in further support of their Motion for
24 Reconsideration. Defendants filed their Motion to Extend Time one day after the
25 deadline, which was initially requested by Defendants and approved by the Court. The
26 Motion to Extend Time fails to comply with LR 6-1(b), which states that "[a] request made
27 after the expiration of the specified period shall not be granted unless the moving party .
28 . . demonstrates that the failure to act was the result of excusable neglect." Defendants

1 have not established excusable neglect. In fact, Defendants failed to offer a reason for
 2 the requested extension. The Motion to Extend Time is therefore denied and
 3 Defendants' reply in further support of their Motion for Reconsideration is untimely.¹

4 **B. Motion for Reconsideration**

5 **1. Standard of Review**

6 Defendants argue that Judge Cobb's Order is dispositive and should be reviewed
 7 *de novo*. (Dkt. no. 17 at 3.) The Court disagrees. Obtaining a default judgment is a two-
 8 step process governed by the Federal Rules of Civil Procedure. *Eitel v. McCool*, 782
 9 F.2d 1470, 1471 (9th Cir.1986). First, "[w]hen a party against whom a judgment for
 10 affirmative relief is sought has failed to plead or otherwise defend, and that failure is
 11 shown by affidavit or otherwise, the clerk must enter the party's default." Fed. R. Civ. P.
 12 55(a). Second, after the clerk enters default, a party must seek entry of default judgment
 13 under Rule 55(b). In this case, after over five (5) months of inactivity from both parties,
 14 Plaintiff moved for clerk's entry of default under Rule 55(a). (See dkt. no. 5). Judge
 15 Cobb's Order directed the Clerk to enter default under Rule 55(a). (Dkt. no. 15). Plaintiff
 16 has not yet applied to the Court for entry of default judgment under Rule 55(b).

17 LR IB 1-3 provides that "[a] magistrate judge may hear and finally determine any
 18 pretrial matter not specifically enumerated as an exception in 28 U.S.C. § 636(b)(1)(A)."
 19 The determination of whether to direct the clerk to enter default under Rule 55(a) is not
 20 specifically enumerated as an exception in 28 U.S.C. § 636(b)(1)(A). LR IB 3-1(a) further
 21 provides that "[a] district judge may reconsider any pretrial matter referred to a
 22 magistrate judge in a civil or criminal case pursuant to LR IB 1–3 where it has been
 23 shown that the magistrate judge's ruling is clearly erroneous or contrary to law." A
 24 decision to direct the clerk to enter default under Rule 55(a) may be finally determined by
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 27 ¹Despite its untimeliness, the Court reviewed Defendants' reply and finds that it is
 28 not relevant to the Court's analysis.

1 a magistrate judge under LR IB 1-3, and thus the Court may reconsider Judge Cobb's
2 Order if it is "clearly erroneous or contrary to law" under LR IB 3-1(a).

3 28 U.S.C. § 636(b)(1)(A) is not an "exhaustive list of all of the pretrial matters that
4 are excepted from the magistrate judge's authority." *United States v. Rivera-Guerrero*,
5 377 F.3d 1064, 1067 (9th Cir. 2004). A magistrate judge's authority depends on whether
6 the matter is dispositive or non-dispositive of a claim or defense of a party. See
7 *Maisonville v. F2 America, Inc.*, 902 F.2d 746, 747 (9th Cir.1990). "[A]ny motion not
8 listed, *nor analogous to a motion listed* in [28 U.S.C. § 636(b)(1)(A)], falls within the non-
9 dispositive group of matters which a magistrate may determine." *Id.* at 748 (emphasis
10 added). The court in *Rivera-Guerrero* found that a motion to involuntarily medicate
11 defendant "is dispositive of a claim or defense of a party" in that it resolves the
12 defendant's assertion that he is not competent to stand trial. 377 F.3d at 1069.
13 Consequently, the court concluded that the motion is "not among the pretrial matters that
14 can be fully delegated to the magistrate judge under [28 U.S.C.] § 636(b)(1)(A)." *Id.*

15 Here, Judge Cobb's Order directing the Clerk to enter default is not dispositive of
16 any of the parties' claims or defenses. A clerk of court's entry of default under Rule 55(a)
17 is merely a prerequisite to the Court's entry of default judgment, but "a plaintiff who
18 obtains an entry of default is not entitled to default judgment as a matter of right." *Warner*
19 *Bros. Entm't Inc. v. Caridi*, 346 F.Supp.2d 1068, 1071 (C.D.Cal.2004) (citation omitted).
20 Instead, whether a court will grant a default judgment is in the court's discretion. *Id.*
21 Defendants may still oppose the Court's entry of a default judgment if and when Plaintiff
22 applies for one.²

23 The Court concludes that the determination of whether to direct the clerk to enter
24 default under Rule 55(a) is not listed in 28 U.S.C. § 636(b)(1)(A) and is not dispositive.
25 Thus, the Court may only reconsider Judge Cobb's Order if it is clearly erroneous or
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27 ²The question of whether the Court should enter default judgment is not presently
28 before the Court.

1 contrary to law. See LR IB 3–1(a); Fed. R. Civ. P. 72(a) (“When a pretrial matter not
 2 dispositive of a party's claim or defense is referred to a magistrate judge to hear and
 3 decide . . . [t]he district judge in the case must consider timely objections and modify or
 4 set aside any part of the order that is clearly erroneous or is contrary to law.”)³

5 This standard of review is significantly deferential to the initial ruling. “A finding is
 6 clearly erroneous when although there is evidence to support it, the reviewing body on
 7 the entire evidence is left with the definite and firm conviction that a mistake has been
 8 committed.” *United States v. Ressam*, 593 F.3d 1095, 1118 (9th Cir.2010) (quotation
 9 omitted). The order “is afforded broad discretion, which will be overruled only if abused.”
 10 *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 446 (C.D.Cal.2007). The Court “may
 11 not simply substitute its judgment for that of the deciding court.” *Grimes v. City & Cnty. of*
 12 *San Francisco*, 951 F.2d 236, 241 (9th Cir.1991).

13 2. Legal Standard

14 Pursuant to Rule 55(a), “[w]hen a party against whom a judgment for affirmative
 15 relief is sought has failed to plead or otherwise defend, and that failure is shown by
 16 affidavit or otherwise, the clerk must enter the party's default.” Generally, to avoid
 17 default, a defendant must serve an answer within twenty (20) days of being served with
 18 the summons and complaint. See Fed. R. Civ. P. 12(a).

19 The Court may set aside a default for good cause under Fed. R. Civ. P. 55(c).
 20 Underlying Rule 55(c) is the strong public policy in favor of resolving a case on the
 21 merits. See *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir.1985). As a
 22 result of this policy, in determining whether to set aside a default, “doubt, if any, should
 23 be resolved in favor of the motion to set aside the [default]....” *Id.* (citations omitted). To

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 25 ³*Segal v. L.C. Hohne Contractors, Inc.*, 303 F. Supp. 2d 790 (S.D.W.V. 2004),
 26 which Defendants cite, is not to the contrary. In *Segal*, plaintiffs moved for entry of
 27 default judgment and sanctions. *Id.* at 791. The magistrate judge treated the motion as
 28 dispositive and issued proposed findings and a recommendation. *Id.* In this case, the
 parties have not moved for default judgment. Because the question before Judge Cobb
 was only whether the Clerk should enter default, Judge Cobb did not issue a report and
 recommendation.

1 determine whether there is good cause to set aside a default, the court considers the
2 following non-exclusive factors: (1) whether the defendants engaged in culpable conduct
3 that led to the default; (2) whether the defendants had a meritorious defense; or (3)
4 whether reopening the default would prejudice Plaintiff. *Franchise Holding II, LLC v.*
5 *Huntington Restaurants Group, Inc.*, 375 F.3d 922, 925–26 (9th Cir.2004) (citation
6 omitted). The defendants bear the burden of showing that any of these factors favors
7 setting aside the default. *Id.*

8 3. **Analysis**

9 Defendants have not asked the Court to set aside default for good cause under
10 Rule 55(c), nor have they explained their culpability, or lack thereof, in causing the
11 default. Instead, Defendants argue that a clerk of court is precluded from entering default
12 after an answer is filed. (Dkt. no. 17 at 1.) Therefore, Defendants argue, Judge Cobb's
13 Order directing the Clerk to enter default is contrary to law. (*Id.*) The Court disagrees.

14 Defendants confuse Rule 55(a) with Rule 55(b). They assert that "the Clerk is
15 precluded from entering a default after Defendants have made an appearance or have
16 filed their answers." (*Id.* at 1–2 (citing *Direct Mail Specialists, Inc. v. Eclat Computerized*
17 *Technologies, Inc.*, 840 F.2d 685, 689 (9th Cir. 1988).) In *Direct Mail*, however, the clerk
18 of court entered default judgment under Rule 55(b)(1). 840 F.2d at 689. The court in
19 *Direct Mail* noted that Rule 55(b)(1), by its own language, "only applies to parties who
20 have never appeared in the action." *Id.* In this case, Judge Cobb's Order directed the
21 Clerk to enter default under Rule 55(a). The Clerk did not enter default judgment under
22 Rule 55(b)(1) and the Clerk was not directed to do so. Rule 55(a) does not contain Rule
23 55(b)(1)'s requirement that the defendant must have been "defaulted for not appearing."
24 An entry of default under Rule 55(a) is merely a prerequisite to default judgment under
25 Rule 55(b). *Direct Mail* thus does not stand for the proposition that a clerk cannot enter
26 default under Rule 55(a) where the defendant has answered or made an appearance.

27 Judge Cobb's Order found that all of the requirements for the Clerk's entry of
28 default under Rule 55(a) were satisfied. As Defendants acknowledge, they were properly

1 served with process and their answers or responses to the Complaint were due on
2 August 31, 2012. (Dkt. no. 12 at 2.) Plaintiff moved for entry of default on February 25,
3 2013. (Dkt. no. 5.) Defendants filed their untimely Answers on February 27, 2013, and
4 March 18, 2013, respectively. (*Id.*) Judge Cobb's Order concluded that the Clerk's entry
5 of default is warranted because Defendants were properly served, the Court has
6 jurisdiction, and Defendants failed to timely respond. (Dkt. no. 15 at 3.) This conclusion
7 is not contrary to law under *Direct Mail*.

8 Further, the Court cannot conclude that Judge Cobb's Order was clearly
9 erroneous. It is clear from the record that Defendants "failed to plead or otherwise
10 defend" in the timeframe permitted by the Federal Rules of Civil Procedure. It is also
11 clear that Defendants filed their responsive pleadings approximately six (6) months after
12 the deadline without an extension of time from the Court. The Court is thus not "left with
13 the definite and firm conviction" that Judge Cobb's Order made a mistake in directing the
14 Clerk to enter default under Rule 55(a).

15 Lastly, the Court rejects Defendants' argument that Plaintiff waived his right to
16 entry of default judgment. (Dkt. no. 17 at 4.) Defendants were aware of this case. They
17 were properly served and they removed to this Court. Defendants had an obligation to
18 timely respond to the Complaint after being properly served but apart from filing a
19 statement of removal, Defendants completely disregarded their obligations and
20 deadlines until Plaintiff moved for clerk's entry of default. Unlike the plaintiff in *FOC*
21 *Financial Ltd. Partnership v. National City Commercial Capital Corp.*, 612 F. Supp. 2d
22 1080 (D. Ariz. 2009), which Defendants cite in support of their waiver argument, Plaintiff
23 did not continue to litigate this case as usual for an extended period of time after the
24 default. Indeed, Plaintiff's motion for clerk's entry of default was its first filing with this
25 Court. In *FOC Financial*, the default was due to a "technical error with little bearing on
26 the disposition of the case," which arose after a motion to dismiss had been filed by the
27 defendant and resolved by the court. *Id.* at 1084-85. Here, Defendants' disregard of its


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1 obligations brought this case to a complete standstill for approximately six (6) months.
2 The Court finds that Plaintiff has not waived his right to entry of default judgment.

3 **IV. CONCLUSION**

4 It is therefore ordered that Defendants' Motion to Extend Time (dkt. no. 28) is
5 denied and Defendants' Motion for Reconsideration (dkt. no. 17) is denied.

6 ENTERED THIS 22nd day of January 2014.

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10 MIRANDA M. DU
11 UNITED STATES DISTRICT JUDGE
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